92-584

Supreme Court, U.S.
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No. 92-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

ERNESTO A. PEREZ,

Petitioner,

vs.

STATE OF WISCONSIN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fourteenth Amendment require the State to honor a criminal defendant's request to have counsel present at his presentence investigation interview?

PARTIES IN COURT BELOW

The present Petitioner and Respondent were the only parties to the proceedings in the Wisconsin Supreme Court from which judgment is sought to be reviewed.

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IN THE

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ERNESTO A. PEREZ,

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STATE OF WISCONSIN,

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PETITION FOR WRIT OF CERTIORARI
TO THE WISCONSIN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Wisconsin Court of Appeals is reported at 487 N.W.2d 630 (Wis. App. 1992) and is reproduced in Appendix B, (App. 3a-29a) of this petition.

JURISDICTION

The decision of the Wisconsin Court of Appeals was entered June 3, 1992. Appendix B (App. 3a-29a). The Wisconsin Supreme Court denied the Petition for Review from the decision of the Court of Appeals, without opinion, on August 11, 1992. (Order reprinted at Appendix A, (App. 1a-2a)). This court's jurisdiction is invoked under 28 U.S.C. § 1257 .

CONSTITUTIONAL PROVISION INVOLVED

This petition concerns the construction and application of the Due Process Clause of the Fourteenth Amendment to the United States Constitution which provides:

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law . . . ."

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

On February 4, 1992, 21-year-old petitioner, Ernesto A. Perez, entered pleas of no contest to misdemeanor charges of battery, contrary to Wis. Stat. § 940.19(1) (1989-90) and exposing genitals to a child, contrary to Wis. Stat. § 948.10 (1989-90) in Winnebago County Circuit Court in Oshkosh, Wisconsin. Appendix B, (App. 6a). Petitioner had no prior arrests or criminal convictions at the time of sentencing. The offenses each carry a maximum penalty of 9 months imprisonment, a $10,000.00 fine, or both. Wis. Stat. § 939.51 (1989-90). A presentence investigation was ordered over defense counsel's objections.

Immediately following the plea hearing, Perez and counsel proceeded to the State of Wisconsin's Bureau of

Community Corrections in Oshkosh to participate in the presentence interview. Prior to the interview, both Perez and Perez' counsel requested that counsel be present during the presentence interview. Counsel was informed by both the presentence writer and her supervisor that he would not be allowed to attend the interview. Counsel and Perez were then informed that the presentence interview would not occur if counsel were to attend the interview. Perez was further informed that if he did not participate in the presentence investigation interview, the sentencing court would be told that Perez was uncooperative. See State v. Perez, 487 N.W.2d 630 (Wis. App. 1992); (Appendix B, (App. 9a-10a)). Perez was subsequently interviewed by the presentence writer without the presence of counsel for approximately 1-1/2 to 2 hours.

Prior to sentencing on April 19, 1991, Perez filed a motion for a new presentence investigation alleging Perez' due process rights were violated because Perez was denied counsel at the presentence interview. The trial court denied the motion. The court stated that the presentence writer reviewed the district attorney's file and, therefore, was aware of both the State's version and alternative versions of the incident. The court further stated it was not a violation of due process that Perez was not permitted to have an attorney present at the presentence interview. The court noted that Perez could have stopped the interview at any time to speak with counsel, or counsel could have told Perez not to answer certain questions that were proposed to him. (Transcript of Oral Decision reprinted at Appendix C, (App.

30a-34a)). (See also Court of Appeals Opinion, Appendix B (App. 9a)).

Perez was subsequently sentenced on each count to 90 days in jail, a $2,500.00 fine and 125 hours of community service. The jail time was ordered to be served consecutively. Appendix B, (App. 7a).

On October 16, 1991, a hearing was held on petitioner's Motion for Post Conviction Relief Including Modification of Sentence. Petitioner renewed his previous motion for a new presentence investigation and new sentencing hearing that was previously decided at the time of sentencing. The trial court on the record on October 16, 1991, (Appendix E, (App. 37a)) and again in a written order dated October 18, 1991, denied petitioner's motion for post conviction relief and his Motion for New Presentence Investigation

and New Sentencing Hearing. Appendix D, (App. 35a-36a).

The Wisconsin Court of Appeals, District II, issued its decision on June 3, 1992. That court affirmed the decision of the trial court and found against Perez as to all issues raised in this petition. The Court of Appeals specifically held that due process does not require the presence of counsel at a presentence interview. The court held that the need to protect the integrity of the sentencing process by guaranteeing that an accurate and unbiased information base is available to the sentencing court outweighs the defendant's due process right to have counsel present. Appendix B, (App. 20a-22a.) Perez raised the identical argument in a Petition for Review filed with the Wisconsin Supreme Court on July 2, 1992. The Wisconsin Supreme Court issued an

order, without opinion, denying review of the Wisconsin Court of Appeals decision on August 11, 1992. Appendix A, (App.1a-2a).

REASONS FOR GRANTING THE WRIT

I. THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE GUARANTEES FAIR AND REASONABLE SENTENCING TO ALL CRIMINAL DEFENDANTS.

The United States Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of law . . . ." U.S. Const. amend. XIV. The United States Supreme Court has held that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause" and that "sentencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." Gardner v.

Florida, 430 U.S. 349, 358 (1977). The Supreme Court generally applies the Due Process Clause in analyzing the fairness of relations between criminal defendants and the State. Bearden v. Georgia, 461 U.S. 660, 665 (1983).

"Once it is determined that due process applies, the question remains what process is due." Morrissey v. Brewer, 408 U.S. 471, 481 (1972). What process is due is flexible and calls for such procedural protections as the particular situation demands. Id.

The Supreme Court has defined the category of infractions that violate fundamental fairness very narrowly. Dowling v. United States, 493 U.S. 342, 352 (1990). In defining due process, judges

> "are to determine only whether the action complained of . . . violates those 'fundamental

> conceptions of justice which lie at the base of our civil and political institutions,' and which define 'the community's sense of fair play and decency.'" Id. at 353. Citations omitted.

Relating to sentencing, due process requires that "the sentencing judge listen to and fairly consider information material to mitigation of punishment." United States v. Coletta, 682 F.2d 820, 827 (9th Cir. 1982) (citing United States v. Doe, 655 F.2d 920, 927 (9th Cir. 1981).

II. THIS COURT HAS NOT YET DECIDED WHETHER THE GUARANTEES OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT PROVIDE A RIGHT TO COUNSEL AT THE PRESENTENCE INTERVIEW.

Many state courts as well as circuit courts of appeals have determined that there is no Sixth Amendment right to counsel at a presentence interview because the presentence interview is not a

critical stage of the proceedings. Lang v. State, 461 N.E.2d 1110 (Ind. 1984); Porter v. State, 354 So.2d 470 (Fla. App. 1978); People v. Daniels, 386 N.W.2d 609 (Mich. App. 1986); State v. Knapp, 330 N.W.2d 242 (Wis. App. 1983); Baumann v. United States, 692 F.2d 565 (9th Cir. 1982); United States v. Jackson, 886 F.2d 838 (7th Cir. 1989); and United States v. Woods, 907 F.2d 1540 (5th Cir. 1990). However, these courts have not considered whether there is a right to counsel under the Fourteenth Amendment's Due Process Clause.

A few states have touched upon the fundamental fairness requirement of the Due Process Clause of the Fourteenth Amendment, but have not based their decisions on that requirement. State v. Knapp, 330 N.W.2d 242, 245 (Wis. App. 1983) (discussing other procedural

safeguards to which the criminal defendant is entitled); Commonwealth v. Burton, 301 A.2d 675, 677 (Penn. 1973) ("defendant is adequately protected from any possible prejudicial inferences in the report"); People v. Palazo, 556 N.Y.S.2d 432, 436 (Sup. 1990) ("[i]n New York State, fundamental fairness in the sentencing process is specifically met by virtue of the statutory scheme . . . ."); People v. Bogart, 560 N.Y.S.2d 266, 267 (Sup. 1990) ("[t]here is no constitutional mandate to permit assistance of counsel at the pre-sentence interview, and the law provides the defendant with 'fundamentally fair' avenues to refute any factors that might negatively impact the court's decision.")

A few courts, however, have noted the significance of the presentence interview in determining the defendant's sentence, and thus in affecting the defendant's

liberty interest. The Oregon Supreme Court has held the Sixth Amendment "require[s] that counsel may not be barred from attendance at a presentence interview." State ex rel. Russell v. Jones, 647 P.2d 904, 907 (Or. 1982). In reaching that decision, the Russell Court noted that historically, before presentence reports were common, the information now contained in presentence reports was provided at the sentencing hearing by the prosecutor, the defendant, defense counsel and other sources. Now, instead of the court collecting the information directly, the court may direct probation officers to perform the initial task on behalf of the court, and to report back to the court. Id. at 905-06. Because a judge now chooses to gather the sentencing information through a probation officer or another individual "makes the

process no less a judicial procedure than when the judge does so directly. The investigation is simply an out-of-court inquiry and hearing on behalf of the judge." Id. at 906.

> "In other words, the investigator informally performs for the judge a function, in part, which would otherwise be performed by the judge as part of the formal sentencing hearing. Functionally, the investigation is a part of the sentencing procedure.
>
> "A defendant is entitled to the assistance of counsel to the same degree when the judge seeks sentencing information from him in open court and when the judge does so indirectly through the out-of-court agency of a probation officer. . . . [J]ust as a sentencing hearing to determine a defendant's future liberty is a stage of a prosecution at which the assistance of counsel cannot be denied, so is a presentence interview." Id. at 906-07.

This Sixth Amendment protection which the Oregon Supreme Court speaks of may not be available explicitly through the Sixth

Amendment, but is certainly available as a due process fairness requirement under the Fourteenth Amendment.

The Ninth Circuit Court of Appeals, relying upon its supervisory power, but addressing due process under the Fourteenth Amendment, found that when a defendant requests his attorney to be present at a presentence interview, the probation officer must honor that request. United States v. Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1990). The court opined that this is necessary to protect the defendant's right to a fair and even-handed sentencing proceeding. Due process requires fair consideration of sentencing information. The probation officer's refusal to honor Herrera-Figueroa's request to be accompanied by counsel at the presentence interview resulted in an infringement of those rights. Id. at 1434.

The court invoked its supervisory power to formulate procedural rules not specifically required by the Constitution or Congress. The exercise of the court's supervisory power is particularly important to ensure a fair sentencing process.

> "A rule requiring probation officers to honor a defendant's request that his attorney be permitted to accompany him to the presentence interview will do much to ensure fairness at a minimal cost to the system. Whether or not the presentence interview constitutes a 'critical stage' in the criminal proceeding for purposes of the sixth amendment, there is no question that it is an important step in the proceedings in terms of the consequences to the defendant. A defendant's conduct at the presentence interview can have a significant effect on the sentence recommendation in the presentence report, and district courts rely heavily on the contents of those reports." Id. at 1434.

The court stated "our system of justice" is based upon the assumption that "whenever important interests of a defendant are at stake, the defendant is entitled to be represented by a lawyer." Id. at 1436 (emphasis omitted). The court further stated that given the importance of the presentence interview to the defendant, there is no justification for excluding defense counsel. Id. at 1435. The court believed that counsel's presence would further the objective of obtaining accurate presentence reports and would expedite sentencing proceedings. Id. at 1436. The court directed that probation officers be required to permit defendant's counsel to accompany their clients at the presentence interview. Id. at 1437.

Nothing in the Federal Sentencing Guidelines excludes counsel from the presentence interview. In fact, most

local criminal rules for United States district courts indicate that, on request, defense counsel should be entitled to be present to protect the defendant's rights whenever the defendant is interviewed by probation officers regarding a presentence report to the court. United States v. Cortes, 922 F.2d 123, 128 (2nd Cir. 1990). The Sixth Circuit Court of Appeals has also held that it is best that counsel accompany the defendant to the presentence interview. United States v. Saenz, 915 F.2d 1046, 1049 (6th Cir. 1990).

> "Counsel's presence will not only serve to continue to safeguard the defendant's rights after he is convicted, but will also reduce the risk of probation officers misapprehending the information related by a defendant." Id.

See also United States v. Tisdale, 952 F.2d 934 (6th Cir. 1992). This is precisely the type of fundamental fairness

that the Due Process Clause is meant to protect.

Pursuant to Supreme Court Rule 10.1(b) and (c), the Wisconsin Court of Appeals and the Wisconsin Supreme Court in denying review, have decided a federal question in conflict with the decision of the Oregon Supreme Court and at least three Federal Circuit Courts of Appeals. Further, the decision of the Wisconsin Court of Appeals concerns an issue which has not fully and completely been decided, although it has been tangentially addressed by other state courts of last resort and certain Federal Courts of Appeals. The issue should be settled by this Court in that it constitutes an important question relating to the fundamental fairness that should be afforded a defendant during the sentencing process.

III. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THE STATE TO GRANT A CRIMINAL DEFENDANT'S REQUEST TO HAVE COUNSEL PRESENT AT THE PRESENTENCE INTERVIEW.

In denying Perez' motion for a new presentence investigation, the trial court indicated that Perez could have stopped the interview at any time to speak with counsel, or counsel could have told Perez not to answer certain questions. This is an unacceptable alternative. It is asking too much for a 21-year-old, first-time criminal defendant to know when not to answer a question during a 1-1/2 hour interview with a seasoned Probation and Parole Department professional. It is also too much to ask a 21-year-old first-time defendant to leave during the interview process to ask counsel questions, especially after the defendant has already been intimidated through

refusal of his request to have counsel present at the interview. Even if a defendant would stop the interview to seek advice of counsel, this would not be enough to protect the defendant's due process rights.

The Ninth Circuit Court of Appeals noted that the presentence interview may pose hazards for the uncounseled defendant. One such hazard is that the sentencing court may consider other alleged criminal conduct of the defendant of which the defendant has not been convicted. United States v. Herrera-Figueroa, 918 F.2d 1430, 1435 (9th Cir. 1990). The Constitution clearly requires that a defendant have the opportunity to be represented by counsel if he or she so desires. Nothing less is acceptable.

Because a trial judge relies so heavily on a presentence interviewer's

recommendation in determining the appropriate sentence, the presentence interview is most certainly an event where important interests of a defendant are at stake. A defendant should thus be permitted to have an attorney present at the presentence interview in order to stabilize the inequality of power between the presentence interviewer and the defendant. Absent the presence of counsel, defendant is likely to be intimidated by the interviewer and will most likely answer questions in ways that are not in the defendant's best interest. In addition, the defendant may omit information that would benefit him.

The view of the Wisconsin Court of Appeals and some other courts that the presence of counsel during a presentence interview would only tend to transform what now is an unbiased information

gathering proceeding into an adversarial proceeding, and that the presence of counsel would impede the function of the probation department during the interview is unrealistic. Presentence interviews are not unbiased, information-gathering proceedings. The presentence interviewer is employed by the state, the same entity that employs the prosecutor. The presentence interviewer works for the court system. Presentence investigation reports are highly biased documents usually heavily weighted against the defendant. It is rare that a presentence investigation favors the defendant over the state. The victim's claim is usually accepted as if it were written in stone, while the defendant's version is suspect.

The instant presentence interview is a perfect example of the problem that exists when presentence investigations are

prepared. It seems the state wishes to keep the presentence interview behind closed doors, so that the state may retain total control over the interview. However, as noted by this Court in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must, therefore, practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." Id. at 170.

As this Court noted many years ago, because even an intelligent and educated layman has small and sometime no skill in the science of law, "[h]e requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932). The Due Process Clause of the Fourteenth Amendment

to the United States Constitution requires that a defendant be permitted to have counsel present at the presentence interview.

Petitioner requests that the Supreme Court grant certiorari on this issue and remand this case for a new presentence interview with counsel present at the interview, to be followed by a new sentencing hearing before a new court.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari to the Wisconsin Supreme Court should be granted.

Dated at Madison, Wisconsin, September 29, 1992.

Respectfully submitted,

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APPENDIX A

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You are hereby notified that the Court has entered the following order:

No. 91-2558-CR State v. Perez L.C.#90CF374

A petition for review pursuant to sec. 808.10, Stats., having been filed on behalf of defendant-appellant-petitioner Ernesto A. Perez, and considered by the court,

IT IS ORDERED that the petition for review is denied, without costs.

Marilyn L. Graves
Clerk of Supreme Court

APPENDIX B

COURT OF APPEALS
DECISION
DATED AND RELEASED

JUNE 3, 1992

No. 91-2558-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ERNESTO A. PEREZ,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Winnebago county: ROBERT A. HAWLEY, Judge. Affirmed.

Before Nettesheim, P.J., Anderson and Snyder, JJ.

ANDERSON, J. Ernesto A. Perez appeals from an order denying his

postconviction motions to modify his sentence and for a new presentence investigation report (PSI) and resentencing. Perez contends that the trial court abused its discretion by imposing an excessive and disparate sentence; by finding that he had the ability to pay a fine of $6000; and that his due process rights were violated when he was denied the assistance of counsel during an interview with the author of the PSI.

We conclude that the sentencing court did not abuse its discretion in imposing the sentence and denying a postconviction motion to modify the sentence. The sentencing court did not abuse its discretion in refusing to reduce Perez's fine because it deferred a final determination of Perez's ability to pay until he had completed the jail time

required by the sentence. Finally, we hold that Perez does not have a due process right to have an attorney present during an interview with the author of the PSI. We affirm.

Perez was a member of a band from Florida known as the "Young Turks" that performed in a bar near Neenah. After a late evening performance, the band members and a number of individuals who had attended the performance went to the motel where the band was staying. Included in this party was Jennifer V., a fifteen-year-old female. At the motel, Jennifer was sexually assaulted by at least three members of the band. During the course of multiple and simultaneous sexual assaults, Perez approached Jennifer, removed his penis from his pants and attempted to have her perform oral intercourse. When she refused, Perez put his penis back into his

pants and repeatedly struck her buttocks with a belt.

Initially Perez was charged with battery to a child, sec. 948.03(2)(b), Stats.; sexual contact with a child, secs 948.02(2), Stats.; and party to a crime of sexual contact with a child. Sections 939.05 and 948.02(2), Stats. As the result of plea negotiations, the state filed an amended criminal complaint charging one count of misdemeanor battery, sec. 940.19(1), Stats., and one count of exposing a sex organ to a child, sec. 948.10, Stats. After Perez entered pleas of no contest to the two misdemeanor charges, the sentencing court ordered a PSI.

At the sentencing hearing, the court denied Perez's motion for a delay of sentencing to permit a new PSI to be prepared. Prior to sentencing, the court

had available the PSI, a victim impact statement, an eighty-one page sentencing memorandum prepared by Perez's attorney, a sentencing memorandum from the state, and testimony of various individuals on behalf of Perez. After a statement from Perez and argument by counsel, the court imposed, on each count, ninety days in the Winnebago county jail, a $2,500 fine and 125 hours of community service. The sentencing court ordered that the jail time was to be served consecutively.

At Perez's request, the sentence was stayed pending motions for postconviction relief and appeal. Perez's request for postconviction relief renewed his motion for a new PSI and sentencing hearing. In his motion for a modification of sentence, Perez contended that the sentence imposed was excessive and disparate when compared to the sentences imposed on other band

members convicted of multiple counts of sexual assault of Jennifer;[1] and asserted that the sentencing court failed to consider his ability to pay the fines and costs imposed.

The sentencing court denied Perez's motion for postconviction relief and modification of sentence. The court held that the sentence imposed was not unduly harsh and that the court had not abused its discretion in imposing a total of six

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[1] Co-defendant William McKelvy was originally charged with seven counts of sexual contact and entered a no contest plea to three counts of felony sexual contact, sec 948.02(2), Stats. The sentencing court, Hon. Thomas S. Williams presiding, withheld sentence and placed McKelvy on probation, with certain conditions, for ten years. Co-defendant Humberto Eugene Diaz was originally charged with three counts of sexual contact and one count of battery to a child. He entered a plea and was found guilty of one count of felony sexual contact, sec. 948.02(2). The sentencing court, Hon. Robert A. Hawley presiding, imposed a jail sentence of one year, a fine and community service.

months county jail time and 250 hours of community service. The court did express uncertainty about the amount of the fine and Perez's ability to pay the fine; the court remarked that the question could be considered again when the case is finally resolved.

PRESENTENCE INVESTIGATION

Perez's attorney accompanied him to the probation and parole office for the PSI interview. Both Perez and his attorney requested that counsel be present during the interview. The agent assigned to prepare the PSI and her supervisor denied the requests. They informed Perez that if he insisted on his attorney's presence, the interview would not take place and the sentencing court would be told that Perez was uncooperative. Perez insists that his due process rights were violated when he was denied the presence

and assistance of his attorney during the PSI interview. He also argues that the PSI was flawed because the author failed to corroborate material information in the report and overlooked exculpatory information.

Perez concedes that State v. Knapp, 111 Wis.2d 380, 330 N.W.2d 242 (Ct. App. 1983), clearly confirms that there is no fifth or sixth amendment right to have counsel present at the PSI interview; however, he claims that there is a due process right to have counsel present. He insists that due process requires that all defendants have a fair sentencing hearing and this can be insured only by the presence of counsel at the interview. Perez does not cite to any precedent that directly supports his argument; rather, he relies upon two cases in which two federal circuit courts of appeals, in the exercise

of their supervisory authority, imposed a rule requiring that attorneys be permitted to attend PSI interviews.[2] United States v. Tisdale, 952 F.2d 934, 940 (6th Cir. 1992); United States v. Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1991).

We decline to adopt these cases for two reasons. First, only two federal appellate courts have adopted the rule to facilitate the implementation of federal sentencing guidelines within their respective circuits.[3] Since Wisconsin

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[2] Neither the sixth circuit nor the ninth circuit justified this rule on the basis of a defendant's fifth or sixth amendment right to counsel or on the basis of any due process right. See United States v. Tisdale, 952 F.2d 934, 939-40 (6th Cir. 1992); United States v. Herrera-Figueroa, 918 F.2d 1430, 1432-33 (9th Cir. 1991).

[3] This rule has not been uniformly adopted in the other appellate circuits. For example, the seventh circuit has refused to find a right to counsel during PSI interviews under the federal sentencing guidelines. United States v.

does not have a similar sentencing scheme, both decisions are of little or no persuasive authority. See Carlson Heating, Inc. v. Onchuck, 104 Wis.2d 175, 179 n.2, 311 N.W.2d 673, 675-76 (Ct. App. 1981).

Second, unlike the federal intermediate appellate courts, the Wisconsin Court of Appeals does not possess any supervisory authority which would permit it to promulgate rules of criminal practice and procedure. Wisconsin's constitution and statutes limit such a law-developing or law-declaring function exclusively to the Wisconsin Supreme Court. See State v. Schumacher, 144 Wis.2d 388, 405-07, 424 N.W.2d 672, 678-79 (1988).

Of course, the state agrees that

Jackson, 886 F.2d 838, 841-44 (7th Cir. 1989).

Knapp holds that there is neither a fifth nor a sixth amendment right to counsel at the presentence interview. But the state goes further to suggest that the analysis we employed in Knapp is broad enough to support a holding that there also is no due process right. We resist the state's suggestion. The only issue before us in Knapp was whether there existed a fifth or sixth amendment right. In answering that question it was not necessary for us to employ a due process analysis.

Due process is a flexible concept. State v. Hardwick, 144 Wis.2d 54, 58, 422 N.W.2d 922, 924 (Ct. App. 1988). Different stages in a criminal proceeding require distinct procedural safeguards. See id. The determination of what procedural safeguards should be afforded a defendant at sentencing begins with an examination of the private interests

affected by governmental action and the precise nature of the governmental function involved. See id.

This analysis has been partially completed. Wisconsin recognizes and protects three due process rights of a defendant at sentencing. First, the defendant has a right to be present at the sentencing and to be afforded the right of allocution. Second, the defendant has the right to be represented by counsel. Finally, the defendant has the right to be sentenced on the basis of true and correct information. Bruneau v. State, 77 Wis.2d 166, 174-75, 252 N.W.2d 347, 351 (1977).

Perez's argument focuses on the third due process right: the right to be sentenced on the basis of true and correct information. He maintains that the author of the PSI adopted the state's account of the events in the motel room pertaining to

the multiple sexual assaults of Jennifer; failed to consider exculpatory information relating to the "consensual nature"[4] of the sexual assault activities; and failed to resolve conflicts between the numerous accounts of what happened. Perez builds

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[4] Perez relies a great deal upon what he says was Jennifer's willingness to participate in sexual activities with certain members of the band. He argues that her willing participation in the varied sexual activities with the other co-defendant mitigates his offenses. Perez ignores a keystone of all the sexual crimes against children defined in ch. 948, Stats.: consent of the child victim is not an element and is not an issue. In Wisconsin, sexual assault is not a crime of physical aggression only against an unwilling victim; it also is a crime when the victim is incapable of giving meaningful consent because of immaturity. See State v. Kummer, 100 Wis.2d 220, 230-32, 301 N.W.2d 240, 246, cert. denied, 451 U.S. 1020 (1981). Whether or not Jennifer may have consented to sexual activity while in the motel room is irrelevant. Because she was a child she could not give meaningful consent. The sentencing court was compelled not to mitigate Perez's offenses because of some misguided belief on the part of Perez and his attorney that a child could agree to any form of sexual contact or sexual intercourse.

on these perceived lapses in the PSI to argue that the presence of his attorney during the interview would have safeguarded his due process right to be sentenced on the basis of true and correct information relating to the multiple sexual assaults episode.[5]

We begin our analysis by considering the private interests of the defendant

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[5] In making this argument Perez disregards an elementary axiom: His no contest plea admitted all of the material facts alleged in the criminal complaint, thus permitting the court to find him guilty of the offenses charged. See State v. Rachwal, 159 Wis.2d 494, 509, 465 N.W. 2d 490, 496 (1991). By pleading no contest he admitted, as alleged in the amended complaint, that Jennifer did not consent to his exposing of his sex organ and she did not consent to being struck on the buttocks with a belt. Combined with the premise in Wisconsin's criminal code that a person under the age of eighteen years cannot consent to any form of sexual activity, supra n.4, Perez's no contest plea erased the nature of Jennifer's "consent" from this case.

that will be affected by governmental action. There is no doubt that an individual convicted of a crime has a substantial stake in the governmental action that follows on the heels of the conviction. The defendant is facing the loss of liberty in the form of the restrictions of probation or the restraints of incarceration. It is because of this private interest that sentencing is regarded as a critical stage of a criminal prosecution. Cf. Knapp, 111 Wis.2d at 382, 330 N.W.2d at 243.

The due process analysis now turns to a consideration of the governmental function involved; in this case it is the sentencing process and the role of the PSI. At sentencing, the court has two equal responsibilities: to the defendant and to society. State v. Heffran, 129 Wis.2d 156, 163, 384 N.W.2d 351, 354

(1986). To fulfill these responsibilities, the court must have all relevant information which will assist it in the formation of an intelligent and informed decision about the appropriate sentence under the facts and circumstances. Id.

To protect the integrity of the sentencing, the court must have a reliable information base. This information base should include relevant information about the offense and the circumstances of its commission, State v. Crowell, 149 Wis.2d 859, 868, 440 N.W.2d 352, 356 (1989), and the defendant's personality, social circumstances and general pattern of behavior, see Heffran, 129 Wis.2d at 163-64, 384 N.W.2d at 354. It is the PSI that principally serves as the court's

information base.[6]

To be reliable, the PSI must be accurate. To safeguard the accuracy of the PSI, the probation and parole agent preparing the report must be neutral and independent of either the prosecution or the defense. See State v. McQuay, 154 Wis.2d 116, 131, 452 N.W.2d 377, 383 (1990). The PSI's author is acting exclusively on behalf of an independent judiciary. See id. In this independent capacity, the PSI author attempts to establish a cooperative relationship with the defendant. See Crowell, 149 Wis.2d at 869, 440 N.W.2d at 356. To encourage the defendant to cooperate with the author and

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[6] The administrative rules dictating the preparation of the PSI stress the need to present the sentencing court with accurate and relevant information upon which the court can base its sentencing decision. WIS. ADM. CODE **sec. DOC 328.27-328.29** and accompanying Appendix.

to provide all relevant information, the preparation of the PSI is not done in accusatorial surroundings. Cf. Knapp, 111 Wis.2d at 386, 330 N.W.2d at 245.

We are convinced that Perez's proposition that due process requires the presence of counsel during a defendant's presentence interview would only tend to transform what now is an unbiased information-gathering proceeding into an adversarial proceeding. The presence of counsel could jeopardize the neutral objectivity of the PSI author and the cooperative surroundings of an independent investigation. The active involvement of an advocate--defense counsel or, for that matter, the prosecution--in the information-gathering process could cause a serious degradation in the reliability and impartiality of the sentencing court's information base.

A defendant is not left without adequate remedies to challenge the accuracy of information in the PSI. There are several safeguards in the sentencing process that effectively protect the due process right of a defendant to be sentenced on the basis of true and correct information. The defendant and defense counsel are present at the sentencing hearing and have the chance to make a statement relevant to the sentencing. Section 972.14(2), Stats. The defendant and defense counsel are given access to the PSI and have the opportunity to refute what they allege to be inaccurate information. See State v. Skaff, 152 Wis.2d 48, 56-58, 447 N.W.2d 84, 87-88 (Ct. App. 1989). Finally, the defendant has the opportunity to file his own presentence memorandum with the court which can present what the defendant

believes to be true and correct information the court should rely upon in sentencing.

Ultimately, the due process right of the defendant to be sentenced on the basis of true and correct information is protected when the sentencing court appropriately exercises its discretion. See Bruneau, 77 Wis.2d at 175-76, 252 N.W.2d at 352. Therefore, we hold that the need to protect the integrity of the sentencing process by guaranteeing that an accurate and unbiased information base is available to the sentencing court outweighs the defendant's interest in having counsel present during the presentence interview.

MODIFICATION OF SENTENCE AND FINE

We now consider Perez's claims that the sentencing court abused its discretion

in refusing to modify his sentence and in finding that he had the ability to pay the fine imposed.

Our review on these issues is confined to a determination of whether the sentencing court abused its discretion. In conducting this review we acknowledge that there is a strong public policy against any interference with the sentencing discretion of the court and there is an equally strong presumption that the sentencing court acted reasonably. The burden is on the defendant to show some unreasonable or unjustified basis for the sentence imposed. State v. Johnson, 158 Wis.2d 458, 463, 463 N.W.2d 352, 355 (Ct. App. 1990).

Perez complains that the sentencing court gave too much weight to its concern for the victim. His argument lacks merit

for two reasons. First, the weight that is attached to any particular factor in sentencing is within the wide discretion of the sentencing court. State v. Evers, 139 Wis.2d 424, 452, 407 N.W.2d 256, 268 (1987). Perez has not shown that the sentencing court either gave too much weight to its concern for the victim or that there were contravening factors that should have outweighed the court's concern. See State v. Jones, 151 Wis.2d 488, 495, 444 N.W.2d 760, 763 (Ct. App. 1989).

Second, in the course of its remarks at sentencing the court considered many factors that it found to be relevant. These factors included Perez's age, maturity, background, lack of a juvenile record, nature of the crimes, the lack of severe physical injuries to Jennifer, Perez's remorse, his acceptance of

responsibility, and the lack of rehabilitative needs that would require probation. The sentencing court also considered that it was necessary to send a message to the community that Perez's behavior was not going to be treated lightly. Thus, the sentencing court properly exercised its discretion and did not give undue weight to the needs of the victim.

Perez's principal complaint is that his sentence was excessive and, when compared to the sentences imposed on his co-defendants, unduly disparate so as to deny him equal protection of the law. We disagree. Jennifer was subjected to multiple and simultaneous sexual assaults in a motel room in the plain view of eight to ten individuals. During the course of the sexual assaults, Perez exposed his genitals to her in an attempt to have her

perform oral sex and, when she refused, he repeatedly struck her on the buttocks with a belt. This was a debasing and degrading invasion of Jennifer's person and we do not find a six-month county jail sentence, out of a possible eighteen months, to be excessive.

Perez points out that both McKelvy and Diaz received lesser sentences for what he characterizes as more culpable conduct. The mere fact that the three sentences are different is not enough to support a conclusion that Perez's sentence is unduly disparate. Even leniency in one case does not transform a reasonable punishment in another case into a cruel one. Ocanas v. State, 70 Wis.2d 179, 189, 233 N.W.2d 457, 463 (1975).

Perez bears the burden of establishing that the disparity in sentences was arbitrary or based upon

considerations not pertinent to proper sentencing. See id. at 187, 233 N.W.2d at 462. We already have concluded that the sentencing court properly considered all of the factors relevant to the sentencing and correctly exercised its discretion.

We conclude there is no evidence the sentencing court was motivated by external pressures. Perez argues that the storm of adverse publicity after McKelvy's sentencing improperly influenced the sentencing court. At the time of the sentencing, the court candidly acknowledged that it was aware of McKelvy's sentence but that it would determine Perez's sentence on the facts of the case without being swayed by the sentences imposed by other courts. At the hearing to modify the sentence, the court held that it had acted within its discretion and that Perez's sentence was

not so disparate as to justify a modification. We agree and hold that the sentencing court did not err when it refused to consider the sentences imposed on the co-defendants.

Perez's argument that the sentencing court erred when it failed to find that he did not have the ability to pay the fine need not detain us for any length of time. Although the court tentatively found that Perez did not have the ability to pay a $6000 fine, it also remarked that Perez could seek review of the fine after this case was resolved. In State v. Milashoski, 159 Wis.2d 99, 464 N.W.2d 21 (Ct. App. 1990), we endorsed such an approach that does not prematurely relieve a defendant of a portion of a sentence. We see no reason to depart from a sound procedure that balances a defendant's

financial circumstances with the purposes of a sentence.

By the Court--Judgment and order affirmed.

Recommended for publication in the official reports.

APPENDIX C

THE COURT: Well, I reviewed the presentence; I also looked over the sentencing memorandum and I guess that state's memorandum as well, and I really as to whether or not-- also Miss Majerus' testimony essentially everything attached to the sentencing memorandum here was contained in the district attorney's file when she reviewed the file; that she at least from my reading of the presentence had an opportunity to hear essentially both versions of the case. As Mr. Biskupic correctly points out as far as the consent issue, that is really a non-issue in this case, may go certainly to the amount of violence, goes to the court's consideration in imposing its sentence; but as far as the age of the victim and what took place, it is really certainly of concern, but doesn't go to

the element of the charge. As far as having Mr Perez's exculpatory evidence; I don't know if that is correct, as far as minimizing his contact with this particular case or exposure to this case heard, and it goes to diminished capacity as he may think it to be. He certainly has had the opportunity, not only in a memorandum but certainly counsel loquaciously presents that to the court; an opportunity to present any witnesses, make his own statement or have any friends and neighbors make statements on his behalf so I really have no problem with the fact that Miss Majerus was completely advised of the issue.

My own problem, Mr. Biskupic, is what do you say about counsel being present during the presentence examination; what about a violation of due process or not?

MR BISKUPIC: Well, as he points out out the Knapp case in Wisconsin addressed that situation and obviously the practice of Winnebago County is consistent with Knapp and I don't see any reason do deviate from past Wisconsin practice and accepted mandatory decision that hadn't been addressed by our appellate or supreme court.

THE COURT: Mr Eisenberg, I guess Knapp was an interview and he requested counsel, and that was refused, he was denied counsel; counsel wasn't present requesting he be allowed into the presentence interview is perhaps distinguishable on its facts there, but this court is not willing to undergo that kind of interpretation on Knapp here although, Mr Eisenberg, is somewhat correct; the Knapp case is somewhat distinguishable on those particular facts.

I don't think I would distinguish that as due process rights were violated by denial of counsel there; he is represented by counsel; at any point counsel has assumingly told him that he could or could not answer certain things that were proposed to him or take a recess to talk to the attorney assuming Mr. Eisenberg was within easy access if he wanted to stop the interview; at any time he could certainly do that. At least at this time, Mr. Eisenberg, I am going to deny your motion for a new presentence or in the alternative to disregard the recommendation of Miss Majerus as a violation of due process. I do find out also that the information was covered completely insofar as even if she didn't look at his McKelvy tape, she essentially got the exculpatory evidence in front of her which was contained in the DA's office

as far as affidavits or other witnesses in this case as far as Mr McKelvy's statements if not the tape. So with that, gentlemen, any reason why we cannot proceed to sentencing now, Mr. Biskupic, Mr. Eisenberg?

MR EISENBERG: No, sir.

MR. BISKUPIC: No.

APPENDIX D

STATE OF WISCONSIN CIRCUIT COURT
WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff, ORDER

vs.

ERNESTO A. PEREZ, Case No. 90-CF-374
a/k/a RHETT O'NEIL,

Defendant.

WHEREAS, a hearing was held on October 16, 1991, on defendant's Motion for Post Conviction Relief Including Modification of Sentence in the above-entitled case; and

WHEREAS, Assistant District Attorney John Daniels appeared on behalf of the State, Attorney Stephen J. Eisenberg appeared on behalf of the defendant, and the defendant appeared by telephone conference call pursuant to Sec. 974.06(5), Wis. Stats.;

IT IS HEREBY ORDERED for the reasons stated on the record at the hearing that defendant's Motion for Modification of Sentence and new sentencing hearing is hereby denied except that defendant may perform the community service outside the State of Wisconsin provided the community service is performed for a legitimate community based operation and further, the defendant may reopen, at a later date as circumstances warrant, his motion to reduce the amount of the fine based upon his ability to pay that fine. All other requests for relief and modification of sentence are denied.

Dated this 18th day of October, 1991.

BY THE COURT:

/S/ Robert Hawley
Robert Hawley

APPENDIX E

THE COURT: I would also respectfully deny Mr. Eisenberg's motion again for a new sentencing hearing. I have to agree with Mr. Daniels' brief that he filed; there is no case law that does permit counsel at a PSI report or preparation, I would have to deny that motion and Mr. Eisenberg, I guess you are the moving party and I would ask you just prepare an order briefly for the court's signature to enable you to perfect your ability to appeal.